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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. ~~1408~~ 521

ERNEST FOGARASCHER and
TABITA FOGARASCHER CIOCAN,
Petitioners,

vs.

ROBERT FRICKE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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ERNEST FOGARASCHER and
TABITA FOGARASCHER CIOCAN,

Petitioners,

vs.

ROBERT FRICKE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

The Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on March 9, 1966.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion and judgment of the Probate Court is unreported and is printed in Appendix A hereto. The judgment of the Court of Appeals for the Eighth District of Ohio is unreported and is printed herein in Appendix B hereto. The judgment of the Supreme Court of Ohio is unreported and is printed in Appendix B hereto.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on March 9, 1966. Rehearing was denied on April 13, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

THE MANNER IN WHICH THE FEDERAL QUESTIONS ARE RAISED.

The petitioners sought review in the Supreme Court of Ohio of the decision of the Court of Appeals of Ohio affirming, without opinion, the judgment of the Probate Court, whereby the statutory rights of these petitioners under Section 2105.06 (H), Revised Code of Ohio, were extinguished without notice and an opportunity to appear.

The right to a review by the Supreme Court of Ohio is dependent upon the discretion of the court in determining that the case is one of public or great general interest, or that a substantial constitutional question is involved. Rules of Practice of the Ohio Supreme Court, Rule I, Sec. 1A (a) (b) (c), Rule II, Sec. 3, printed in Appendix C hereto.

The petitioners sought review of the decision of the Court of Appeals by means of a motion in the Supreme Court of Ohio requesting it to direct the lower appellate court to certify its record to the Supreme Court for review, and as an appeal of right on the ground that the decision of the Court of Appeals of Ohio violated their constitutional rights of procedural due process as guaranteed to them by Article I, Section 16, of the Ohio Constitution, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Ohio denied the motion to certify and rejected the appeal as of right on the basis that no substantial constitutional question is involved.

The petitioners applied to the Supreme Court of Ohio for a rehearing, urging that their judgment is contrary to the decision of this Court in *Mullane v. Central Hanover Bank*, 339 U. S. 306. The application was denied on April 13, 1966, Appendix B.

QUESTION PRESENTED.

Whether the statutory rights of these petitioners to inherit as next of kin may be extinguished by a summary proceeding under Section 2115.16, Revised Code of Ohio, which provides for notice thereunder only to the "executor or administrator and his attorney"?

STATUTES INVOLVED.

The statutory provision involved is Section 2115.16 of the Revised Code of Ohio. Appendix D.

STATEMENT.

Ernest Fogarascher died intestate on November 17, 1963, a resident of Cleveland, Ohio, leaving these petitioners as his sole next of kin. Shortly thereafter, on or about November 19, 1963, one Edmond F. Fecser made and filed an application in the Probate Court for Letters of Administration. The information set forth, under oath, in the application, among other things, indicates that Ernest Fogarascher *left no surviving spouse and a niece and nephew in Rumania named Ernest Fogarascher and Barbara Fogarascher,* petitioners herein. In addition thereto, there appears in said application an inscription, as follows: "Applicant is close friend of deceased. Has knowledge of family ties." Appendix E.

The record shows, without revealing the reason therefor, that the application for Letters of Administration filed by Edmond F. Fecser was denied and that a subsequent application filed by Henry S. Friedman, Esquire, was approved by the Court. The statements, under oath, contained in the latter application also inform the court that the decedent left no *surviving spouse* and that *he left a niece and nephew* named Ernest Fogarascher and Barbara Fogarascher, who reside in Rumania. Appendix E.

On or about May 14, 1964, Robert O. Fricke, Esquire, filed Exceptions to Inventory of the Administrator, as the attorney in fact for Helga Endruschat and Michael Andreas Endruschat, residents of West Germany, alleging that said parties were the surviving spouse and minor child, respectively, of Ernest Fogarascher, deceased, and excepting to the Inventory filed with the Court for the reasons that it did not provide for a year's allowance and statutory exemption for the alleged widow and support for the alleged minor son. Notice of the filing of the Exceptions to Inventory and of the time of the hearing thereupon was given only to the administrator and his attorney, in compliance with Section 2115.16, Revised Code. There was no notice, actual or constructive, given to the next of kin of the decedent, the petitioners herein.

On August 11, 1965, an entry was made in the Probate Court finding that Helga Endruschat was the common law wife, and Michael Endruschat, the minor son of the decedent, Ernest Fogarascher, and sustaining the exceptions to the inventory filed by Helga Endruschat, as alleged surviving spouse. On August 12, 1965, an order was rendered by said court approving the entry sustaining the aforesaid exceptions. Appendix F.

The petitioners subsequently learned about the foregoing proceedings and actions, and thereupon filed their Motion to Strike Depositions and to Vacate Entry Sustaining Exceptions to Inventory and to Vacate Order Approving the Entry Sustaining Exceptions to Inventory and For a New Trial, and For Leave to File Answer, attached thereto.

This motion was overruled by the probate judge. The reasons given in support of the ruling as set forth in an accompanying memorandum were that "the requirements of notice as set forth in R. C. 2115.16" (Ohio Code)

have "been complied with," that "full adversary hearing" was had "on the merits" and that the proceeding was one "in rem." Appendix B.

On an appeal therefrom, the Court of Appeals affirmed without opinion. The Supreme Court of Ohio refused to review the decision.

REASON FOR GRANTING THE WRIT.

1. The statutory notice of Section 2115.16, Revised Code of Ohio, contravenes the requirements of the Fourteenth Amendment, and the determination of the issue of a common law marriage pursuant to Section 2115.16 deprived the petitioners of property without due process of law.

The purpose of exceptions to the Inventory and Appraisement in a decedent's estate is to correct the inventory by causing it to reflect the proper statutory allowances and items of property subject to administration, and to exclude specific items of property not so subject. The proceeding, in connection therewith, is summary in nature. It is special and designed to facilitate the administration of estates. *In re Estate of Gottwald*, 164 Ohio St. 405, 131 N. E. (2d) 586. The relevant statute, Section 2115.16, Revised Code of Ohio, provides that notice thereof and time of hearing thereon shall be given only to the fiduciary and his attorney.

The issue of whether or not the decedent had a common law wife was raised by filing exceptions to the inventory under Section 2115.16 of the Revised Code of Ohio. Notice of the exceptions was given to the administrator, but no attempt, whatsoever, had been made to notify the niece and nephew, petitioners herein.

Admittedly, the probate court has jurisdiction in proceedings regarding the inventory, to determine whether

the widow's allowance and other statutory rights were granted to a surviving spouse, but this summary procedure does not extend to and is totally inappropriate for the purpose of determining the issue of the common law marriage, as was done in the instant case, where there is no requirement of notice to all parties who would be affected thereby.

It is interesting to note that the Probate Court sustained the proceedings complained of herein on the basis that the requirements of notice as set forth in R. C. 2115.16 were complied with, that a full adversary hearing was had on the merits, and that the proceeding was one in rem. Appendix A.

Herein lies the problem as to whether such a proceeding, as a basis for an adjudication depriving known persons whose whereabouts also are known, of substantial property rights, is constitutionally correct? We believe not.

We submit that the decision of this Court in *Mullane v. Central Hanover Bank*, 339 U. S. 306, is controlling in the resolution of the problem herein. In the *Mullane* case, this Court declared that publication alone may not be sufficient where it is reasonably possible or practicable to give more adequate notice. In this connection, the Court stated,

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The question of adequacy of notice was before the Court in *Schroeder v. City of New York*, 371 U. S. 208, wherein it was stated relative to the problem:

> "The general rule that emerges from the Mullane case is that notice by publication is not enough with re-

spect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings."

Obviously, if publication may be challenged as an inadequate means of informing interested parties of the fact that their rights are before the courts, certainly the complete denial of any notice, whatsoever, can hardly be defended as constitutionally sufficient.

There is nothing in the record to show that any attempt had been made to inform the petitioners of the proceedings regarding the claim of common law wife. It appears that the respondent was content merely to comply with the notice provision of the statute under which he was proceeding, although that statute did not direct or authorize service of notice upon these petitioners whose names and addresses were known, or could have been ascertained with reasonable diligence. The failure or neglect to effectuate service of notice upon these petitioners was condoned by the Ohio courts on the ground that the relevant statute, Section 2115.16, Revised Code of Ohio, does not provide for notice to parties such as the petitioners.

The adjudication that the decedent had a common law wife, and, thereby, left a spouse surviving him, extinguished the statutory rights of these petitioners to inherit from the estate of the decedent. But for this judicial determination, of which proceedings petitioners had no knowledge, they would have been entitled to the entire net estate.

To the extent that Section 2115.16 of the Revised Code of Ohio is invoked for the purpose of establishing the claim of a common law marriage, the summary procedure thereof is violative of the due process rights of

those who are not aware of the proceeding, and whose legally protected interests are directly affected thereby.

The proceeding complained of offends the due process rights of these petitioners as secured to them by the Fourteenth Amendment.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. VINTILLA,

Counsel for Petitioners.

APPENDIX A.

MEMORANDUM OF PROBATE JUDGE.

The requirements of notice as set forth in R. C. 2115.16 having been complied with and a full adversary hearing having been had on the merits and the proceeding being one *in rem*, the motion to strike depositions and to vacate the judgment sustaining the Exceptions to the Inventory and for new trial are overruled.

ORDER OF PROBATE JUDGE OVERRULING MOTION.

On this 16 day of June, 1965, this cause came on to be heard on the motion heretofore filed on February 11, 1965, by Ernest Fogarascher and Tabita Fogarascher Ciocan, heirs at law of Ernest Fogarascher aka Ernest Fogarasher, deceased, for an order of the Court striking deposition and vacating entry sustaining exceptions to inventory and vacating order approving the entry sustaining exceptions to inventory and for a new trial and leave to file answer.

Whereupon, the Court being fully advised in the premises and a full adversary hearing having been had on the merits and the proceeding being one in rem, finds that the aforesaid motion should be overruled.

Wherefore, it is by the Court ordered that the aforesaid motion be and it is hereby overruled.

APPENDIX B.

JOURNAL ENTRY OF THE COURT OF APPEALS.

This cause came on to be heard on appeal on questions of law from the judgment of the Probate Court of Cuyahoga County, and was argued by counsel for the parties; and upon consideration thereof, the Court finds there is no error prejudicial to the appellant, and, therefore, the judgment of the Probate Court is affirmed, and it is ordered that appellee recover of appellant his costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Probate Court of Cuyahoga County to carry this judgment into execution.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO.

(March 9, 1966.)

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed, sua sponte, no substantial constitutional question involved.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(April 13, 1966.)

It is ordered by the court that rehearing in this case is denied.

APPENDIX C.

RULES OF PRACTICE OF THE SUPREME COURT OF OHIO.

* * * * *

RULE I.

NOTICE OF APPEAL.

Section 1. From Court of Appeals.

(A) The notice of appeal from a Court of Appeals must be filed in the court from which the case is appealed within twenty days in a civil case (Section 2505.07, Revised Code) and within thirty days in a criminal case (Section 2953.05, Revised Code) from the entry of the judgment or final order appealed from and shall set forth:

(a) The order or judgment appealed from, and

(b) Whether the case originated in the Court of Appeals, and

(c) Whether the case involved a substantial constitutional question.

* * * * *

Section 3. Consideration as to Existence of Constitutional Question.

If an appellant claims a constitutional question and also proposes to prosecute an appeal on issues of law of public or great general interest, he must file both at the same time.

Where appellant claims that he has an appeal as of right (*i.e.*, that the case involves a constitutional question), the Supreme Court will *sua sponte* consider the case as on a motion to dismiss said appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

* * * * *

APPENDIX D.

STATUTE.

Revised Code of Ohio, Section 2115.16:

"* * *. Exceptions to the inventory or to the year's allowance may be filed at any time prior to five days before the date set for the hearing or the date to which such hearing has been continued by any person interested in the estate or in any of the property included in the inventory, but such time limit for the filing of exceptions shall not apply in case of fraud or concealment of assets. When exceptions are filed notice thereof and time of hearing thereon shall forthwith be given to the executor or administrator and his attorney by registered mail or by personal service, unless such notice is waived. At the hearing the executor or administrator and any witness may be examined under oath. The court must enter its finding on the journal and tax the costs as may be equitable."

APPENDIX E.

APPLICATION FOR LETTERS OF ADMINISTRATION.

In Re Estate of Ernest Fogarascher, deceased.

Edmond F. Fecser, being duly sworn, says that Ernest Fogarascher, late a resident of Cleveland, in said County, died on or about the 17th day of November, 1963, leaving no surviving spouse, and the following persons h_____ known next of kin:

Name	*Kinship*	*Age*	*P. O. Address*
Ernest Fogarascher	Nephew	?	Romania
Barbara Fogarascher	Niece	?	Romania

The undersigned asks to be appointed Administrator, being duly sworn, and says that the estate consists of:

Personal property of the probable value of____$1,000.00
Real estate of the probable value of_____$8,000.00
Total $9,000.00

* * * * *

There is not to my knowledge any last Will and Testament of said decedent.

Applicant is close friend of Deceased. Has knowledge of family ties.

APPLICATION FOR LETTERS OF ADMINISTRATION.

Henry S. Friedman, being duly sworn, says that Ernest Fogarascher, late a resident of the City of Cleveland, in said County, died on or about the 17th day of November, 1963, leaving no surviving spouse, and the following persons his known next of kin:

Name	*Kinship*	*Age*	*P. O. Address*
Janas Ats	Cousin		664 Newcastle Road Newcastle, England
Barbara Fogarascher	Niece		Petrila-Lonia,
Ernest Fogarascher	Nephew		Rumania

The undersigned asks to be appointed Administrator, being duly sworn, and says that the estate consists of:

Personal property of the probable value of____$20,000.00
Real estate of the probable value of_____$42,000.00
Total $62,000.00

APPENDIX F.

JOURNAL ENTRY OF THE PROBATE COURT.

(August 11, 1964.)

This cause came on to be heard on the Exceptions to the Inventory filed in the above-entitled matter. The Court finds that notice has been given to the Administrator as provided by law, that there were no known next-of-kin other than the exceptors, whose names or residence were known either to the exceptors or the Administrator.

The Court further finds from the depositions taken at Hamburg, Germany, and the testimony, that the following persons are entitled to inherit under the law of the State of Ohio, from the estate of Ernest Fogarascher, a. k. a. Ernest Fogarasher, deceased:

Helga Fogarascher, a. k. a. Helga Endruschat, adult, surviving spouse of said decedent, Tornquistrasse Nr. 4, Hamburg, Germany, inheritance—one-half (1/2).

Michael Andreas Fogarascher, a. k. a. Michael Andreas Endruschat, a minor, son of said decedent, Tornquistrasse Nr. 4, Hamburg, Germany, inheritance—one-half (1/2).

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No. ~~1403~~ 521

ERNEST FOGARASCHER and
TABITA FOGARASCHER CIOCAN,
Petitioners,

vs.

ROBERT FRICKE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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In the Supreme Court of the United States

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ERNEST FOGARASCHER and
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Petitioners,

vs.

ROBERT FRICKE,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

QUESTION PRESENTED.

Whether upon exceptions filed to an Inventory and Appraisal, the Probate Court in Ohio can determine that a woman was the surviving spouse and therefore entitled to a year's allowance and exempted estate?

REASONS FOR DENYING THE WRIT.

I. Under Sections 2115.02 and 2115.05 of the Ohio Revised Code, every executor or administrator must make and file an inventory and appraisal of his decedent's estate within one month of his appointment.

II. Under Section 2115.13 of the Ohio Revised Code, the appraisers must provide an exempted estate for the surviving spouse. The exempted estate is a preferred claim against the estate, *Raleigh v. Raleigh*, 153 Ohio St. 160, 91 N. E. 2d 241 (1950), and is so reflected on the inventory and appraisal.

III. Under Section 2117.20 of the Ohio Revised Code, the appraisers must set off to the widow a year's allowance. The year's allowance is a debt against the estate, *Raleigh v. Raleigh, supra* and is so reflected on the inventory and appraisal.

IV. Under Section 2115.16 of the Ohio Revised Code, "exceptions to the inventory or to the year's allowance may be filed at any time prior to five days before the date set for the hearing" on the Inventory. Notice of the exceptions under Section 2115.16 "shall forthwith be given to the executor or administrator and his attorney by registered mail or personal service. * * *"

V. In the instant case Respondent was allowed neither an exempted estate, nor a year's allowance as provided by law. Pursuant to Ohio Revised Code 2115.16, Respondent filed exceptions to the Inventory and Appraisal, and gave notice according to that section. The Probate Court found Respondent to be the surviving spouse and thus entitled to a year's allowance and exempted estate. Such determination was made in accordance with the Ohio Statute and case law. See, *In re: Clark,* 69 Ohio Abs. 435, 128 N. E. 2d 437 M. C. O., October 6, 1954; *In re: Scott,* 8 O. N. P. (NS) 279, 19 O. D. N. P. 577 (1909).

VI. In view of the above, it is apparent that petitioner's contention is without foundation.

The reason that Ohio Revised Code 2115.16 provides that notice of proceedings thereunder is given only to the fiduciary and his attorney is clear. The fiduciary has the duty of preparing and filing the inventory and appraisal pursuant to Ohio Revised Code 2115.02 and 2115.05. Accordingly, the Ohio Legislature has placed the duty of defending the contents and accuracy of the inventory upon the fiduciary.

Notice to others would thus be inconsistent with the subject matter and purpose of the statute.

VII. The merit of petitioners' contentions has already been decided adversely to them by this Court in the case of *McCaughey v. Lyall*, 224 U. S. 558 (1912). In that case, the plaintiffs in error were heirs at law of a deceased mortgagor. Under California law, title to the mortgaged realty vested in the heirs upon the death of their ancestor, subject to being divested in the course of administration. However, the California Civil Code, Section 1582, provided that an action to foreclose the mortgage could be maintained solely against the decedent's executor. Pursuant to this statute and under court decisions construing it, the complainant heirs were not made parties to the foreclosure proceedings. They claimed that the statute as construed deprived them of property without due process of law.

The court held unequivocably that the State of California had the right to define the necessary parties to a proceeding involving the devolution of the estate of a California decedent.

In view of the decision in the *McCaughey* case, it is evident that this Court should not question the right of the State of Ohio to define the parties who are necessary to the determination of questions regarding the substance of the inventory and appraisal which the decedent's fiduciary is required by law to prepare, to file and to defend. To hold otherwise would deny to the State of Ohio the power to legislate with reference to the subject matter of Ohio fiduciaries and their duties, a result clearly not contemplated by either the State or Federal Constitutions.

VIII. Petitioners, in relying on the cases of *Mullane v. Central Hanover Bank and Trust*, 339 U. S. 306 (1950)

and *Schroeder v. City of New York*, 371 U. S. 208 (1962), have begged the question by assuming the major premise of their argument—that they were entitled to notice. In *Mullane* and *Schroeder*, the complainants were afforded notice by the statutes in question. The issue in those cases was the sufficiency of the quality of the notice.

CONCLUSION.

The Supreme Court of Ohio denied the Petitioner's motion to certify and their appeal as a matter of right because it felt that no Constitutional question was involved. Clearly, Respondents maintain that the State of Ohio has the right to control the devolution of property within its borders. The statute in question which defines that the fiduciary is the only necessary party to an action challenging the inventory and appraisal of a decedent's estate is clearly proper and Constitutional, being a reasonable exercise of the power of the State of Ohio to legislate with reference to Ohio fiduciaries and their duties in respect to the administration of their decedent's estate. *McCaughey v. Lyall*, 224 U. S. 558 (1912).

Respectfully submitted,

ELLIS V. RIPPNER and
RICHARD W. SCHWARTZ,
Counsel for Respondent.

APPENDIX.

STATUTES.

Ohio Revised Code, Section 2115.02. Inventory; separate schedule:

"Within one month after the date of his appointment, unless the Probate Court grants an extension of time for good cause shown, every executor or administrator shall make and return on oath into court a true inventory of the real estate of the deceased located in Ohio and the chattels, moneys, rights, and credits of the deceased which are to be administered and which have come to his possession or knowledge. * * *."

Ohio Revised Code, Section 2115.05. Who shall make inventory:

"After giving the notice required in Section 2115.04 of the Revised Code, the executor or administrator, with the aid of the appraisers, if an appraisement is made, shall make the inventory required by Section 2115.02 of the Revised Code."

Ohio Revised Code, Section 2115.13. Property exempt from administration:

"When a person dies leaving a surviving spouse or minor children, certain properties, if selected as provided in this section, are not assets or administered as such, but must be included and stated in the inventory of the estate. * * *"

Ohio Revised Code, Section 2117.20. Year's allowance to widow and children:

"The appraisers of a decedent's estate shall set off and allow to the widow and to the children under the age of eighteen years, or if there is no widow then to such

children, sufficient provisions or other property to support them for twelve months from the decedent's death, * * *"